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Supreme Court of the United States

OCTOBER TERM 1937

No. 190

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

THOMAS O'ROURKE GALLAGHER,
LOUIS HALLE,
JOSEPH P. NOLAN,
Attorneys for Petitioners.

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, pray that a writ of certiorari issue to review the Judgment of the United States Circuit Court of Appeals for the Second Circuit, on which decision was rendered on the 14th day of June, 1937, affirming the judgment of the United States District Court, for the Southern District of New York, at the Borough of Manhattan, City and State of New York, convicting the defendants of a violation of Title 19, United States Code, Section 1593A and B, and Title 18, United States Code, Sections 88 and 150.

Statement of the Matter Involved

The defendants were charged with smuggling into the Port of New York 1,800 cases of alcohol, on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A on the first count of an indictment; with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B on the second count, and with having conspired together and with others to do these acts, in violation of Title 18, United States Code, Section 88, on the third count.

The alleged conspiracy as charged in the indictment, covered a period of time from the 15th day of October, 1935, to the date of the filing of the indictment, to wit, May 15th, 1936.

The Government, in order to prove its case, by its agents, testified that over this period of time Federal agents had the defendants under observation, and had tapped numerous telephone wires, and had listened in to over five hundred telephone calls between the various parties and others.

Of these, the prosecuting attorney selected 72 messages for introduction into evidence, and over strenuous objection, timely made and persisted in throughout the trial, Federal agents were permitted to testify to the contents of said telephone messages.

The Circuit Court of Appeals in its decision in this case, specifically stated with reference to these messages:

> "They had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question" (Opinion in the Record).

The decision then deviated, to pass upon a specific message and continuing on the main theme with reference to these messages, further stated:

> "A more serious matter relating to the introduction of all the messages and which is applicable to all the appellants concerns their admissibility in view of 47

U. S. C. A., Sec. 605 which is a part of the Federal Communications Commission Act of June 19, 1934 and was a part of the Radio Act of 1927" (Opinion in the Record).

The Circuit Court also conceded in its decision that said section "refers only to interstate and foreign messages. There were enough of them introduced in evidence so that we need not now be concerned with any distinction between what were purely intrastate messages and what were not. That aside, decision turns upon whether, assuming that the interception of the messages was unlawful, their introduction in evidence was error" (Opinion in the Record).

Your petitioners respectfully submit this is in direct conflict with the decision in the case of *Hearst* against *Black*, decided by the United States Court of Appeals for the District of Columbia, Case No. 6808, Nov. 7th, 1936.

Your petitioners respectfully submit that numerous other serious errors had been committed by the trial court which the Circuit Court of Appeals refused to consider, but which your petitioners feel this court should pass upon.

Question Involved

Assuming that the interception of telephone messages was unlawful, was their introduction into evidence error?

The Circuit Court in its opinion stated that if this is a fact "reversal must follow without question".

Statute Involved

Title 47, U. S. C. A., Section 605, provides in part as follows:

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Reasons for Allowance of Writ

It is respectfully submitted that Title 47, U. S. C. A., Section 605, and its interpretation involves "an important question of federal law which has not been, but should be, settled by this court" (Rules Supreme Court of the United States, Rule 39—paragraph 5—Sub-division b).

The Circuit Court of Appeals relied upon the decision in the case of Olmstead v. United States, 277 U. S. 438, decided June 4th, 1928.

This was a decision by a divided court (5 to 4) and was decided prior to the enactment of Title 47, U. S. C. A., Section 605, which was enacted June 19th, 1934.

WHEREFORE your petitioners respectfully pray that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

New York, N. Y., July 12, 1937.

FRANK CARMINE NARDONE,
AUSTIN L. CALLAHAN,
HUGH BROWN,
ROBERT GOTTFRIED,

By: THOMAS O'ROURKE GALLAGHER,
JOSEPH R. NOLAN,
LOUIS HALLE,
Counsel for Petitioners.

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FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

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BRIEF IN SUPPORT OF PETITION

The opinion rendered by the United States Circuit Court of Appeals, Second Circuit, will be found annexed to the transcript of the record.

No opinion was rendered by the United States District Court, for the Southern District of New York.

Jurisdiction

The statutory provision under which the jurisdiction of this court is invoked is Section 240 (a) of the Judicial Code, as amended by Act of February 13th, 1925, and the Act of March 8th, 1934.

Statement of the Case

Statement of the case is set forth in the petition.

Specifications of Errors to be Urged

It is respectfully submitted that the Circuit Court of Appeals misinterpreted the explicit provisions of Title 47, U. S. C. A., Section 605, which is a part of the Federal Communications Act of June 19th, 1934, in approving of

the introduction into evidence of the contents of 72 telephone messages, many of which were interstate, unlawfully intercepted by government agents, in an attempt to obtain evidence against these defendants.

ARGUMENT

POINT I

Title 47 U. S. C. A. Section 605, prohibits the use of such evidence so obtained.

This statute specifically states that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

The defendants were charged with conspiring between themselves and others, to smuggle into the United States 1,800 cases of alcohol at the Port of New York.

The conspiracy it is charged extended over a considerable length of time.

> "It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while Government agents were listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the Government's proof and if they were erroneously admitted reversal must follow without question." (Opinion of the Circuit Court of Appeals in this case.)

This Federal statute referred to herein specifically stated that *no person*, not being authorized by the sender should intercept any communication and divulge or publish the contents, etc., to *any person*.

This statute means just what it says. It applies to everyone. The words used when it refers to intercepting a message are the words "no person" and when it refers to the prohibition against divulging and publishing the contents are "any person."

Had Congress wished or desired to make an exception in the prosecution of criminal cases, it would have been a simple matter for Congress to so state in writing the law.

Congress did not see fit and Congress did not make any exception.

The statute itself is explicit.

Congress even went further than this and it not alone prohibited the interception and publication of communications, but also made it a criminal offense to do so. Title 47, U. S. C., Sec. 501, specifically prescribes that a violation shall be punishable by a fine of not more than $10,000.00 or by imprisonment for a term of not more than two years or both.

POINT II

The decision in the Olmstead case is not controlling.

The Circuit Court of Appeals relied upon the decision in the case of *Olmstead against United States*, 277 U. S. 438, decided June 4th, 1928, which considered the admissibility of evidence obtained by Government officer tapping a wire in violation of a criminal statute of the State of Washington, and held same admissible.

The court's decision was based upon the fact that there was no Federal statute at that time prohibiting same.

Subsequent to this decision and on June 19th, 1934, the Federal Communications Commission Act (which included Title 47, U. S. C. A., Section 605) became part of the law of the land.

In the Olmstead case, a government officer tapped a wire in violation of a state statute. In the case on appeal, government agents admitted tapping wires and listening to

communications without the consent of the "senders" in violation of this federal statute.

Congress in enacting Title 47, U. S. C. A., Section 605, used clear and unmistakable language. It expressly forbade *any person* from intercepting any communication and divulging or publishing the contents *to any person*.

This is an all embracing statute; there is no limitation or exception made in the law.

POINT III

Conclusions

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for writ of certiorari should be granted.

Respectfully submitted,

THOMAS O'ROURKE GALLAGHER,
LOUIS HALLE,
JOSEPH P. NOLAN,
Attorneys for Petitioners.